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WONG VUI CHIN

v.

PP

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COURT OF APPEAL, KOTA KINABALU
TENGKU BAHARUDIN SHAH JCA
JEFFREY TAN JCA
T SELVENTHIRANATHAN JCA
[CRIMINAL APPEAL NO: S-05-95-2005]

C

17 NOVEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(d), (da) - Double presumptions - Whether rule against double presumption offended - Failure or miscarriage of justice occurred - Whether sufficient evidence*

D

to warrant conviction

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in 147.94 grammes of methamphetamine - Appeal against - Whether invoking of double presumption invoked under ss. 37(d) and 37(da) led to miscarriage of justice - Whether physical and mental*

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elements of possession established - Whether appellant's conduct/demeanour consistent with knowledge of drugs - Whether absence of forensic evidence rendered conviction unsafe - Whether presumption of trafficking properly invoked - Whether sampling of less than 10% of total weight of drugs

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prevented invocation of presumption of trafficking

A police team led by PW3 were at the Labuan Ferry Terminal to conduct a routine search of passengers. A ferry from Kota Kinabalu berthed and the appellant was the first passenger to alight. He walked hurriedly with a newsprint package and a yellow

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plastic bag ('bag'). When he saw Chief Inspector Nik (PW3), he stopped and turned back and his face turned pale. The appellant was then apprehended and he was in a state of panic. The bag was found to contain some dried pork, dried cuttlefish and a paper box inside a black plastic. The paper box was subsequently

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found to contain 147.94 grammes of methamphetamine. In the newsprint package were three glass rods that could be used for the intake of methamphetamine. The appellant was in a state of anxiety and when the drugs was uncovered, he slumped down, fell into a squatting position and turned pale white. In his defence,

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the appellant claimed that a friend called Ah Hwa had asked him to take some medicine wrapped in black plastic to Labuan. He was supposed to telephone one Ming Ker when he reached Labuan.

The police telephoned Ming Ker's number but the person at the other end did not know the appellant. The appellant was convicted and sentenced for the offence of trafficking the drugs. Hence this appeal. The appellant contended, *inter alia*, that: (i) the presumption of trafficking could not be invoked since less than 10% of the weight of the drug in question was analysed; (ii) the failure by the prosecution to examine the appellant on the role of Ah Hwa and Ming Ker was tantamount to acceptance of the story of the appellant; (iii) there was no evidence that the appellant had knowledge of the drugs; (iv) guilty knowledge should not be inferred; (v) the appellant's demeanour was because he was frightened when he first encountered the police; (vi) the absence of fingerprint evidence; (vii) the trial judge had invoked the presumptions under s. 37(d) and (da) of the Dangerous Dugs Act 1952 ('the Act'), which offended the rule against the invocation of a presumption upon a presumption.

Held (dismissing the appeal and affirming the verdict)
Per Jeffrey Tan JCA:

(1) The trial judge held that the "presumptions under s. 37(d) and s. 37(da) (had) not been rebutted". That was a clear misdirection of the law. Clearly, the rule against the invocation of double presumptions was offended. But that was not to say that the verdict would be reversed as a matter of course, on account of the misdirection. The overriding concern was whether there had been a failure of justice or a miscarriage of justice. There would be no miscarriage or failure of justice where there is sufficient evidence to warrant the conviction. *Lorensus Tukan v. PP*; *Basil Omar v. PP; Tunde Apatira & Ors v. PP* (refd). (paras 8 & 9)

(2) The indisputable evidence was that the appellant was carrying the bag containing the said drugs. The appellant was conscious or aware of the bag in his hand. Both the physical and mental elements of possession of the bag were clearly made out. (para 15)

(3) The appellant's conduct and/or demeanour were consistent with knowledge of the drugs inside the bag. His conduct before arrest was not consistent with absence of knowledge. The conduct after arrest was also not consistent with the defence. Since there was no explanation for the total conduct, it could be reasonably inferred that the appellant must have had knowledge of the drug in the bag. (para 20)

(4) Since the weight of the drugs exceeded 50 grammes and possession had been proved, the presumption of trafficking ought to be invoked. (para 21)

(5) The absence of forensic evidence was of no significance. The alleged failure of the prosecution to examine the appellant on the role of "Ah Hwa" and or "Ming Ker" was also of no consequence since at the material time, the appellant was undoubtedly in possession. (para 23)

(6) The weight of drug sample tested, it being less than 10% of the total weight of the drugs in question, was also a non issue, as that there is no legal provision which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. *Chu Tak Fai v. PP* (refd). (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Sepasukan anggota polis yang diketuai oleh SP3 berada di Terminal Feri Labuan bagi membuat pemeriksaan rutin terhadap penumpang-penumpang. Sebuah feri dari Kota Kinabalu telah mendarat dan perayu adalah penumpang pertama yang keluar darinya. Perayu berjalan dengan cepat sambil memegang sebungkusan akhbar dan satu beg plastik kuning ('beg'). Apabila perayu melihat Cif Inspektor Nik ('SP3'), beliau berhenti dan dengan muka yang pucat berpusing ke belakang. Perayu ditangkap ketika berada dalam keadaan panik. Beg didapati mengandungi daging khinzir yang dikeringkan, sotong yang dikeringkan dan satu kotak kertas yang di baluti plastik hitam. Kotak kertas kemudian didapati mengandungi 147.94 gram methamphetamine. Di dalam bungkusan akhbar pula terdapat tiga batang kaca yang boleh digunakan untuk menyedut methamphetamine. Perayu berada dalam keadaan gelisah dan bilamana dadah ditemui, beliau terus jatuh terduduk dalam keadaan mencangkung dengan mukanya berubah pucat lesi. Dalam pembelaannya, perayu mendakwa bahawa beliau diminta oleh seorang kawannya yang bernama Ah Hwa untuk membawa ubat-ubatan yang dibungkus di dalam plastik hitam ke Labuan. Didakwa seterusnya bahawa beliau sepatutnya menelefon seorang Ming Ker apabila sampai di Labuan. Pihak polis telah menelefon nombor Ming Ker tetapi orang yang menjawab memberitahu bahawa ia tidak mengenali perayu. Perayu telah disabit dan dihukum atas kesalahan mengedar dadah berkenaan dan perayu merayu. Antara lain perayu berhujah bahawa: (i) anggapan mengedar tidak boleh dikenakan oleh kerana kurang dari

10% berat dadah tersebut telah dianalisa; (ii) kegagalan pendakwaan memeriksa perayu berkaitan peranan Ah Hwa dan Ming Ker adalah sama seperti menerima cerita perayu; (iii) tiada keterangan bahawa perayu mempunyai pengetahuan mengenai dadah; (iv) andaian pengetahuan salah tidak seharusnya dibuat; (v) tingkahlaku perayu adalah disebabkan beliau ketakutan apabila pertama kali bertembung dengan polis; (vii) hakim bicara telah mengenakan anggapan di bawah s. 37(d) dan (da) Akta Dadah Berbahaya 1952 ('Akta'), dan sekaligus melanggar kaedah yang melarang pengenaan anggapan berganda.

Diputuskan (menolak rayuan dan mengesahkan keputusan) Oleh Jeffrey Tan HMR:

(1) Hakim bicara memutuskan bahawa "anggapan-anggapan di bawah s. 37(d) dan (da) telah tidak disangkal". Itu adalah satu salah arahan undang-undang yang nyata. Adalah jelas bahawa kaedah yang melarang pemakaian anggapan berganda telah dilanggar. Namun, itu tidak bermakna bahawa keputusan dengan sendirinya perlu diakas, berdasarkan salah arahan tersebut. Perkara yang lebih perlu dibimbangi adalah sama ada telah berlaku salah laksana atau kegagalan keadilan. Salah laksana atau kegagalan keadilan tidak berlaku di mana terdapat keterangan mencukupi untuk mewajarkan sabitan. *Lorensus Tukan v. P*; *Basil Omar v. PP*; *Tunde Apatira & Ors v. PP* (dirujuk)

(2) Keterangan yang tak boleh disangkal adalah bahawa perayu telah membawa beg yang mengandungi dadah berkenaan. Perayu sedar mengenai beg yang ada ditangannya. Maka kedua-dua elemen mental dan fizikal pemilikan beg telah dibuktikan dengan jelas.

(3) Tingkahlaku atau kelakuan perayu adalah konsisten dengan pengetahuan mengenai dadah di dalam beg. Kelakuan beliau sebelum tangkapan adalah tidak konsisten dengan ketiadaan pengetahuan. Kelakuan selepas tangkapan juga tidak konsisten dengan pembelaan. Oleh kerana tiada penjelasaan diberi mengenai kelakuan beliau keseluruhannya, maka rumusan boleh dibuat bahawa perayu memang mengetahui mengenai dadah di dalam beg.

(4) Oleh kerana berat dadah melebihi 50 gram dan milikan telah dibuktikan, anggapan pengedaran harus dikenakan.

(5) Ketiadaan keterangan forensik adalah tidak penting. Dakwaan kegagalan pendakwaan untuk menyoal perayu berkaitan peranan "Ah Hwa" dan "Ming Ker" juga tidak penting oleh kerana, pada waktu material, perayu jelas mempunyai milikan.

(6) Berat sampel dadah yang diuji, yang merupakan kurang dari 10% berat keseluruhan dadah, juga bukan satu isu, kerana tiada peruntukan undang-undang yang mengkehendaki sekurang-kurangnya 10% keseluruhan berat dadah perlu diambil bagi tujuan analisa. *Chu Tak Fai v. PP* (dirujuk)

Case(s) referred to:
Basil Omar v. PP [2002] 4 CLJ 418 CA ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***
Johar Mustapha v. PP [2009] 6 CLJ 193 FC ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
Mohd Haikal Mohd Khatib Saddaly & Ors v. PP [2009] 1 LNS 292 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843; JT3/2003 CA ***(refd)***
Ramis Muniandy v. PP [2001] 3 SLR 534 ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 60(1), 92
Criminal Procedure Code, s. 422
Dangerous Dugs Act 1952, ss. 2, 37(d), (da)

For the appellant - Peter Vung Yin Sing; M/s Junuis Vung & Co
For the respondent - Mohamad Abazafree Mohd Abbas; AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Jeffrey Tan JCA:

[1] This is an appeal by the accused against conviction and sentence for the offence of trafficking in a dangerous drug (147.94 grammes of methamphetamine) at the Labuan Ferry Terminal, at about 5.55pm on 16 June 2000.

[2] The prosecution evidence could be summarised as follows. On the day in question, five plainclothes police officers led by Chief Inspector Nik Mohd Zuhry bin Mohd Yusoff (PW3) were at the Labuan Ferry Terminal to conduct a routine search of passengers arriving from Kota Kinabalu. At about 5.55pm, a ferry (Labuan Express 2) from Kota Kinabalu berthed at the terminal. The first passenger to alight was the appellant, who walked hurriedly towards the ferry terminal with a newsprint package and a yellow plastic bag in his right hand. When PW3 set his eyes on the appellant, the appellant stopped and turned back (see p. 68 of the Appeal Record). The face of the appellant turned pale when he (appellant) saw PW3 and Sergeant Major Alias Abas (see 69AR). Sergeant Major Alias Abas went after and apprehended the appellant, who was in a state of panic when he was apprehended (see 119AR). At the Customs Inspection Area of the said terminal, the appellant was asked to place the newsprint package and yellow plastic bag on the examination counter. PW3 enquired as to the nature of the contents in the yellow plastic bag. The appellant replied that it was pork - "dalam ada daging babi" (see 69AR). PW3 instructed Corporal Jonathan anak Amat (PW4) to open the yellow plastic bag. PW4 opened the yellow plastic bag and took out the following contents, namely, (i) a plastic package containing dried pork, (ii) a plastic package containing dried cuttlefish, (iii) a black plastic bag containing a paper box embossed "PERSKINDOL", and, (iv) a Labuan Express two ferry ticket with the number 04311 and the date 16 June 2000 in the name of the appellant. Before he opened it, PW4 asked the appellant as to the owner of that box. PW4 opened the paper box and uncovered four plastic packets of a white crystalline substance which was subsequently found to contain 147.94 grammes of methamphetamine. After those contents of the paper box had been uncovered, the appellant said "ini barang bukan saya punya, kawan kirim dari KK" (see 114AR & 115AR). As the bags were being examined, the appellant was in a state of anxiety

A (see 119AR). PW3 testified that when the crystalline substance was uncovered, the appellant slumped down, fell into a squatting position, and turned pale white (see 72AR). PW4 and PW5 further related that the appellant looked scared and was in a state of panic when he was handcuffed by PW5. In the newsprint
B package were three glass rods that could be used for the intake of methamphetamine (see p. 76 of the AR).

[3] At the close of the prosecution case, the learned trial judge called for the defence. The appellant testified as follows. He was
C at Kota Kinabalu to give some money to his sister for the erection/ upkeep of his grandmother's tomb. After he had given that money to his sister, he proceeded to buy some dried pork and dried cuttlefish. After he had made those purchases, he met a friend, Ah Hwa, at the rear entrance of Wisma Merdeka. Ah Hwa asked
D where he was going. He replied he was going to Labuan. Ah Hwa asked him to take something to Labuan. He asked what was that something. He said that he would not take that thing if it were proscribed by law. Ah Hwa assured him that it was just medicine wrapped in black plastic. Ah Hwa gave him the mobile telephone
E number of one Ming Ker whom he (appellant) was to contact when he reached Labuan. Ah Hwa also gave him his (Ah Hwa's) telephone number and three glass tubes wrapped in newsprint. He did not open the black plastic bag. He did not investigate and he did not see the contents of the black plastic bag (see 183AR). He
F bought his ticket and boarded the ferry to Labuan. Upon arrival at Labuan, he saw a number of police officers, but he was not perturbed by their presence as he had nothing illicit on him. As he was walking towards the ferry terminal, an officer from the Criminal Investigation Department arrested him. He asked for the
G reason for his arrest. He was told it was to facilitate a [search]. He surrendered his things for inspection. He walked away momentarily to throw his cigarette butt. But when he was back, he found that the things he surrendered had been riffled - "barang-barang tersebut telah dibongkar". He was asked "Ini
H barang siapa punya?". He replied that the dried pork and dried cuttlefish belonged to him. PW4 enquired about the black plastic bag. He replied that it was medicine that a friend had entrusted him to take to Labuan (see 180AR). PW4 asked about the contents of the black plastic bag. He said he had no knowledge,
I as it was "kiriman kawan" (see 181AR). At the police station, Inspector Ahmad recovered the telephone number of Ming Ker from him. Inspector Ahmad telephoned that number, but the

person at the other end did not know him (appellant). There were calls thereafter to his telephone, all answered by Inspector Ahmad. Apart from that oral testimony, the appellant also tendered his caution statement (exh. D1) in evidence.

[4] At the end of the entire case, the learned trial judge held that there was no doubt as to guilt. Against conviction and sentence, the appellant appealed.

[5] Wide-ranging arguments were advanced to reverse the conviction. In his written submission, Mr Peter Vung for the appellant contended that the presumption of trafficking could not be invoked by reason that less than 10% of the weight of the drug in question was analysed, that failure by the prosecution to examine the appellant on the role of Ah Hwa and Ming Ker was tantamount to acceptance of the story of the appellant, (see 185AR & 186AR), that there was no evidence that the appellant had knowledge of the "amount of drugs", that it could not be said that the appellant was in possession of the drugs in the paper box unless the appellant knew that the paper box in the black plastic bag contained methamphetamine, that the appellant had "shown that he did not know the contents of the paper box when he was asked about the contents in that box and he answered "Itu barang bukan saya punya, kawan kirim", that the caution statement of the appellant "proved that (the appellant had) no knowledge whatsoever of the incriminating drugs", that the appellant was not told that it was methamphetamine, that guilty knowledge should not be inferred, that at all times the appellant maintained that "the medicine ... in the black plastic bag belonged to someone else", that the appellant had cast a doubt on his knowledge of the drugs, that the demeanour of the appellant was because he was frightened "when he first encountered the police", that innocence was supported by the fact that the appellant did not attempt to run away or throw away the yellow plastic bag, that absence of knowledge was supported by the failure in the investigation to dust the bags and paper box for the fingerprints of the appellant or to examine the finger nails of the appellant for the presence of drugs, that the reasoning and observation of the learned trial judge on the credibility of the appellant could not be sustained, and that the learned trial judge erred in law in finding possession.

[6] In his oral submission, Mr Peter Vung again contended that the prosecution had not cross-examined the appellant on the role of Ah Hwa. But learned counsel had one other argument. He contended that the learned trial judge had invoked the presumptions under ss. 37(d) and 37(da) of the Dangerous Dugs Act 1952 (Act), which, if true, would offend the rule against the invocation of a presumption upon a presumption (see *Muhammad Hassan v. PP* [1998] 2 CLJ 170).

[7] Learned deputy public prosecutor, Mohamad Abazafree bin Mohd Abbas, did not hide the fact that the learned trial judge had indeed held at p. 39 of his judgment that "under s. 37(d) of the Dangerous Drugs Act 1952 the accused is presumed until the contrary is proved, to have been in possession of the drug methamphetamine and being in excess of the presumptive amount of 50 grammes, the accused is presumed until the contrary is proved to have trafficked in it". But learned DPP contended that the learned trial judge also found direct possession without resort to s. 37(d) of the Act. In relation thereto, learned DPP pointed to p. 20 of the judgment, where the learned trial judge found "direct evidence to show that the accused was in physical possession of the drugs ..." and to p. 27 of the judgment, where the learned trial judge held "therefore *prima facie* his possession of the black plastic bag with the Perskindol box and its contents lead to the strong inference that he has knowledge of its contents". Learned DPP cited the case of *Basil Omar v. PP* [2002] 4 CLJ 418 where it was held by the Court of Appeal, following the Federal Court case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 per Gopal Sri Ram JCA, as he then was, that a conviction will be upheld despite a misdirection where the (appellate) court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction, and the case of *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, where it was held by the Federal Court per Arifin Zakaria FCJ, as he then was, that it was open to the prosecution to rely on either the presumption under s. 37(d) or the presumption under s. 37(da). As for the other points raised by learned counsel, the learned DPP relied on his written submission.

[8] Learned DPP agreed that the learned trial judge had invoked the presumption of possession under s. 37(d) of the Act. But learned DPP must have noted that the learned trial judge had also invoked the presumption of trafficking under s. 37(da). At p. 21

of his judgment, the learned trial judge found that the appellant was "carrying", "transporting" and "delivering" the said drugs. The learned trial judge then relied on s. 2 of the Act which defined trafficking to include the act of carrying, transporting and delivering any dangerous drug. But at p. 40 of his judgment, the learned trial judge held that the "presumptions under s. 37(d) and s. 37(da) (had) not been rebutted". That was a clear misdirection of the law. Clearly, the rule against the invocation of double presumptions was offended.

[9] But that is not to say that the verdict would be reversed as a matter of course, on account of the misdirection. In relation to the duties and powers of the Court of Appeal, s. 60(1) of the Courts of Judicature Act 1964 provides:

> At the hearing of an appeal the (Court of Appeal) shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the (Court Of Appeal) may thereupon confirm, reverse or vary the decision of the (High Court), or may order a retrial or may remit the matter with the opinion of the (Court of Appeal) thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
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> > Provided that the (Court of Appeal) may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[10] The duty of an appellate court in dealing with an appeal where misdirection has occurred was put by the former Supreme Court per Seah SCJ in *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162, as follows:

> Misdirection is not of itself a sufficient ground to justify interference with the verdict; the appellate court must proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has occasioned a failure of justice. If the court so finds, then it has a duty to interfere. In deciding whether there has been a failure of justice in consequence of a misdirection, the appellate court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted (see *Abdul Rahim v. King-Emperor* [1945-46] 73 IA 77).

[11] The following test propounded by Sir Barnes in Elahee Buksh 5 Suth WR 80 (where the trial judge had seriously misdirected the jury) in dealing with an appeal where misdirection has occurred was adopted by the former Supreme Court in *Lorensus Tukan*:

> That the verdict and conviction ought not to be set aside if the court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the judge with the aid of assessors, instead of by jury.

[12] The overriding concern is whether there has been a failure of justice or a miscarriage of justice (see *Lorensus Tukan*, where it was held by the former Supreme Court that the words "failure of justice" in s. 422 of the Criminal Procedure Code should carry the same meaning as "miscarriage of justice" under the proviso to s. 60 of the Courts of Judicature Act 1964). The object of s. 422 of the CPC is to secure justice by preventing the invalidation of a trial already held on the ground of any error, omission or irregularity, unless it has occasioned a failure of justice. "It is certainly the duty of the appellate court to decide whether in a particular case any error, omission or irregularity is curable under s. 422 of the Criminal Procedure Code ... the appellate court must also decide whether the misdirection in law has occasioned a failure of justice. See *PP v. Ishak Hj Shaari And Other Appeals* [2003] 3 CLJ 843 (CA), with a coram of five judges" (*Mohd Haikal Mohd Khatib Saddaly & Ors v. PP* [2009] 1 LNS 292 per Abdul Malik Ishak JCA).

[13] There would be no miscarriage or failure of justice where there is sufficient evidence to warrant the conviction. If, but only if, the error has occasioned a failure of justice, would the Court of Appeal declare the trial a nullity by reason that the misdirection amounted to an illegality (*PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843; JT3/2003). So, in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, the Federal Court held that where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection (for the record, *Tunde Apatira* was decided at first instance in 1995 before the double presumption rule had come into being in *Muhammed Hassan v. PP* [1998] 2 CLJ 170).

[14] In *Tunde Apatira*, Gopal Sri Ram JCA, as he then was, thus summed up the way in which the proviso to ss. 60 and 92 of the Courts of Judicature Act is to be applied: A

> The expression 'miscarriage of justice' appears in the proviso to s. 92(1) of the Courts of Judicature Act 1964. A similar expression, 'failure of justice' appears in section 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows: B
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> > Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. C
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> The way in which the proviso is to be applied has been considered in several cases. Three of these deserve mention. D
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> In *Mraz v. the Queen* [1955] 93 CLR 493 at p. 514, Fullagar J, when addressing a similar provision in the New South Wales Criminal Appeal Act 1912 said: E
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> > It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried. F G H
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> In *Krishna Murthy v. Abdul Subban* [1965] 1 Cr LJ 565 & p. 576, Hedge J when dealing with the Indian equipollent of s. 422 of our Criminal Procedure Code said:
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> > The expression 'a failure of justice has in fact occasioned thereby' found in s. 535(1), Cr PC does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person I

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> is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the legislature need not have introduced the conception of 'failure of justice' in ss. 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

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In *Rattan v. R* [1974] CLR 510 at p 516. However, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

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> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

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So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been misdirection. Exceptionally, a conviction will be upheld despite misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcantara a/l Ambross v. PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 illustrates the exception.

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[15] But given the available evidence, conviction was the correct verdict. The indisputable evidence was that the appellant was carrying the said yellow plastic bag containing the said drugs in his hand as he was walking towards the ferry terminal. Given so, then there could be no doubt that the appellant was conscious or aware of that yellow plastic bag in his hand. Both the physical and mental elements of possession of the said yellow plastic bag were clearly made out.

[16] The defence was that the appellant had no sight, and therefore had no knowledge, of the drugs, and that he was an innocent carrier. That sort of defence, namely the absence of specific knowledge of the contents, was carefully considered in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, where the Federal Court per Arifin Zakaria FCJ, as he then was, wholly agreed with the following judgment of Lord Morris in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356:

> ... if, however someone deliberately so assumes control of some of the package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[17] The Federal Court was also in full agreement with the following opinion of the Singapore Court of Appeal in *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633, 639:

> For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v. Public Prosecutor* [1978-1979] 1 SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

A We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring
B that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v. Hla Win* [1995] 2 SLR 424 at p 438:

C > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[18] In *PP v. Abdul Rahman Akif*, the facts were, the respondent
D was the only person in the car at the material time, the drugs were found hidden under the driver's seat and front passenger seat, and the car was in possession of the respondent for more than seven months prior to his arrest. But applying the observations of the Singapore Court of Appeal in *Zulfikar*
E *Mustaffah v. PP* and in *Ramis Muniandy v. PP* [2001] 3 SLR 534, and of the House of Lords in *Warner v. Metropolitan Police Commissioner*, the Federal Court held that an irresistible inference could be drawn in the circumstances that the respondent all along knew about the drugs found in the car, and that the fact that the
F drugs were found hidden and wrapped in newspaper would not assist the respondent to negate such an inference. The Federal Court furthermore held that on the facts and in the circumstances, the learned trial judge ought to come to the finding "that *prima facie* the respondent had possession of the drug independent of the
G statutory presumption under s. 37(d) of the Act".

[19] Knowledge is inferred (also see *Chan Pean Leon v. PP* [1956] 1 LNS 17, where it was held that knowledge cannot be proved by direct evidence but can only be inferred from the surrounding
H circumstances), and in relation hereto, the conduct of an accused is highly material particular. In *Parlan Dadeh v. PP* [2009] 1 CLJ 717 the Federal Court explicated on the correlation between conduct and knowledge of an accused person of the offending exhibits in his possession as follows:

I > The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under s. 8 of the Evidence Act 1950 ('the Act') since it has a direct bearing

on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the appellant himself as required by s. 9 of the Act. However, as the appellant did not offer any explanation for his reaction upon being approached by the police, it could be validly used as evidence against him. In the circumstances, the inference to be drawn from the evidence was that he knew what he was carrying.

[20] In relation to the defence - the appellant had no sight, and therefore had no knowledge, of the drugs, and the appellant was an innocent carrier - the learned trial judge found that the conduct and or demeanour of the appellant were consistent with knowledge of the drugs inside the yellow plastic bag. In particular, the learned trial judge took issue with the reaction (slumping down and falling into a squatting position) and facial expression (turning whitish pale) of the appellant when the drugs were uncovered, and with the demeanour (looking scared and trembling) of the appellant when he was handcuffed. But to be fair, the aforesaid reaction, expression and or demeanour of the appellant might well have been that of an innocent person caught unwittingly in the same situation, that is, being arrested and then being confronted with damning evidence that he had no knowledge of. All except that the total conduct of the appellant betrayed him. The conduct of the appellant was suspicious from the start. The appellant was the first to alight from the ferry. Thereafter, the appellant walked hurriedly towards the ferry terminal. It would appear that the appellant was intent on not lingering in the ferry terminal. If the appellant had no prior knowledge of the drugs, then it should be that he would continue to proceed to the ferry terminal quite unperturbed by the presence of the police. Indeed, it was the testimony of the appellant that he saw the police officers but that he was not perturbed by their presence. And if stopped by the police, the reaction of the appellant ought to have been of surprise and or annoyance with the action of the police. But the reaction of the appellant was none of that. The appellant turned pale when he saw PW3 and Sergeant Major Alias Abas. The appellant turned and retreated. The appellant had to be physically apprehended. And when apprehended, the appellant was in a state of panic. That conduct before arrest was not consistent with absence of knowledge. The conduct after arrest was also not consistent with the defence. The appellant was in a state of

anxiety as the bags were being examined, whereas he should be unfazed by it all if he were completely in the dark about the presence of drugs in the bags. Then, as noted by the learned trial judge, there was the conduct of the appellant after the drugs were uncovered. Given that there was no explanation for the total conduct, it could only be reasonably inferred that the appellant must have had knowledge of the drug in the bags. Any other inference would be contrary to the evidence. On the available evidence, the irresistible finding must be that the appellant had physical possession of the said drugs, and that the appellant knew, that inferred, that in his physical possession were the said drugs.

[21] The weight of the drugs in question exceeded 50 grammes. Given that possession had been proved, the presumption of trafficking ought to be invoked (see *Johar Mustapha v. PP* [2009] 6 CLJ 193 per Alauddin Mohd Sheriff PCA). Even if the presumption of trafficking could not be invoked on account of the fact that it was custody and or control rather that possession which must therefore be presumed, there was yet a complete case. The fact of the matter was that the appellant was carrying drugs, from Kota Kinabalu to Labuan, of a quantity larger than would have been likely to have been needed for his personal consumption. In *Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181; [1981] 1 MLJ 64, 69, Lord Diplock held as follows:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible - even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

[22] Crucially, the facts of the instant case warranted such an inference to be drawn. With that inference, it did not matter whether it was a case of direct or presumed possession. A reasonable tribunal would have convicted the appellant on the available evidence, on a proper direction.

[23] The absence of forensic evidence was of no significance. The alleged failure of the prosecution to examine the appellant on the role of "Ah Hwa" and or "Ming Ker" was also of no consequence, as the all-important issue was whether the appellant was in possession at the material time. And at the material time, the appellant was undoubtedly in possession. The weight of drug sample tested, it being less than 10% of the total weight of the drugs in question, was also a non issue, as it was categorically held by the Federal Court in *Chu Tak Fai v. PP* [2006] 4 CLJ 931 that there is no legal provision which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis.

[24] For the aforesaid reasons, we unanimously affirm the verdict and dismiss the appeal.